

FIRST APPEAL NO.3109 OF 1999 WITH CIVIL APPLICATION
NO.4841 of 1999 WITH CIVIL APPLICATION NO.6068 OF 1999.

Hon'ble MR.JUSTICE M.H.KADRI

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- of India, 1950 of any Order made thereunder?

- [illegible]

Versus

SKF TEXTILMASCHINEN - KOMPONENTEN GMBH

Mr. Dushyant Dave, Senior Advocate, with Mr. Dinjar Madon and Mr. Ashir Amin, Advocates, with Mr. Kartikey Thakar, Advocate, for M/s. Trivedi & Gupta, for the respondent.

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 19/07/1999

C.A.V. Judgment:

1. Appellant has filed this First Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ('Act' for short) read with Rule 217 of the Gujarat High Court Rules, 1993, challenging the judgment and order dated May 12, 1999, rendered by the learned District Judge, Vadodara, in Misc. Application No.70 of 1999, by which order, the learned District Judge has dismissed the Misc. Application filed by the appellant under Section 9 of the Act for interim measures.

2. The appellant is a company incorporated in the year 1957 under the Companies Act, 1956, having its registered office at Makarpura, Vadodara. The main business of the appellant is manufacture of highly specialised proprietary nature textile machinery components known as components of drafting systems and components of spindle drives used in ring spinning machines, such as Spindle Inserts, Spindle Bolsters, Top Rollers, Top Arms, Cradles, Bottom Roller Bearings, Jockey Pulleys, etc. The respondent is a company incorporated under the laws of Germany having its registered office at Loewentorstrasse 68, D-70376 Stuttgart, Germany.

3. In the year 1989, the appellant and the respondent entered into a Technical Collaboration Agreement (hereinafter referred to as 'Collaboration Agreement') dated September 12, 1989. The Collaboration Agreement between the parties was a wide-ranging one, which covered various items and their modifications/improvements under 11 Product Group I to XI. Product Group Nos. I, II, III, IV consisted of products/items that formed the core business of the appellant since its inception. The other Product Groups Nos. V to IX and XI were for other sophisticated components in the textile and computer field manufactured by the respondent which were not hitherto part of the business of the appellant such as computer spindles, open end machine bearing assemblies, integral shaft bearing assemblies, etc.

4. The appellant and the respondent commenced executing the objects/terms of the said Collaboration

Agreement for provision of technical know-how, etc. as per the schedule drawn up in the Collaboration Agreement, by which in a phased manner, the items under Product Group Nos. I to IV and X were to be first commenced. As per the say of the appellant, it changed over completely to the manufacture of respondent's design products making large investment in the machinery, manufacturing processes, and manufacturing activities for the same. The appellant was solely dependent on the respondent to provide necessary know-how, etc. for the said purpose.

5. After some time, it was realised that, with respect to Product Group Nos. V to IX and XI which contained items of diversification that were not within the existing manufacturing set-up of the appellant-company having regard to international situation for these products, world-wide competition in respect thereof, demand in India, costs and viability for manufacture in India, it would not be feasible within the term of the Collaboration Agreement for manufacture of those products by the appellant. Accordingly, the parties entered into Amendment Agreement to the Collaboration Agreement on September 23, 1991 to delete the said Product Group Nos. V to IX and XI from the scope of the Collaboration Agreement. While entering into amendment agreement, the respondent also specifically represented to the appellant that with respect to the items falling under the Product Group X, i.e. improved components of drafting systems, i.e. Top Arms, Apron Guiding Devices, Top Rollers, etc. although this product group was vital to the business of the appellant and was part of its core activities since its inception, since no new or improved technology was available or likely to be available in the near future for these items, the said product group came to be deleted from the scope of the Collaboration Agreement. As per the say of the appellant, since the appellant till then had been receiving technical cooperation from the respondent, the appellant agreed to delete Product Group X from the scope of Collaboration Agreement, since its collaboration with the respondent had been for 'new and improved items' and it had been represented to them by the respondent that there were no new or improved items under this Product Group likely to be there within the life of the Collaboration Agreement. Therefore, Product Group X was deleted by clause (v) of the Amendment Agreement.

6. It is alleged by the appellant that the representations made by the respondent incorporated in clause (v) of the amendment agreement with respect to

items falling under Product Group X, turned out to be deliberate and fraudulent misrepresentation to deny the appellant the new and improved items falling in Product Group X which were subsequently introduced by the respondent first for exhibition and display purposes then for commercial sale in the international market, and subsequently for marketing/sale and potential manufacture in the territory of the Collaboration Agreement. The said fraud in the Amendment Agreement was compounded by further series of fraudulent misrepresentations over the years, to conceal the true nature of the fraud from the appellant. The appellant having realised the fraud perpetrated upon them by the respondent and having the fraud become known to them had immediately filed Regular Civil Suit No.211 of 1998 in the Court of 3rd Joint Civil Judge (S.D.), at Vadodara, for declaration and injunction. In the suit, the appellant also submitted application Exh.5 for ad-interim injunction under the provisions of Order 39 Rule 1 & 2 and Section 151 of the Code of Civil Procedure, 1908, ('Code' for short).

7. In the suit, the respondent appeared and filed its objections to the appellant's prayers of ad-interim injunction. The respondent filed application Exh.13 and raised a preliminary objection with regard to maintainability of the suit in view of arbitration clause in the Collaboration Agreement. The respondent also submitted application Exh.23 on April 6, 1998 under Section 8 of the Act and prayed to the Court to refer the dispute to arbitration in terms of clause 20.1 of the Collaboration Agreement. In the said application, the respondent also prayed to stay hearing of the suit.

8. As per the version of the appellant, during the pendency of application Exh.5, the appellant learnt from a press release issued by the respondent's holding company, SKF of Sweden, dated October 21, 1998, on the internet, that a decision had been taken by SKF Group of their intention to withdraw from the textile machinery components business. According to the appellant, it also received various confirmation of the same with respect to closure of the respondent's operations/activities from December 31, 1998 and retrenchment of all its workers and its intention to sell of its assets related to the textile machinery components business. The appellant, therefore, filed applications for interim relief, being Exh.33, on November 23, 1998, and Exh.34 on December 16, 1998, under Sections 94, 151 and Order 39 of the Code. Along with the abovestated applications, the appellant produced documentary evidence with regard to respondent's intention to sell its assets including press reports from

German newspapers, and letters of confirmation from newspapers.

9. Learned 3rd Joint Civil Judge (S.D.), at Vadodara, who heard applications Exh.13 and 23 in Regular Civil Suit No.211 of 1998, on January 2, 1999, passed the following order:-

"Indo-German Chamber of Commerce is appointed as a Sole Arbitrator to decide this dispute. The question of interim injunction will be decided by this Court. The arbitrator is directed to file the award after proceedings in accordance with the Arbitration and Conciliation Act, 1996, within four months from the receipt of this order. A yadi be sent to the Arbitrator. The defendant is directed to deposit Rs.25,000/- towards arbitration costs at the first instance in the Court within 7 days."

(Emphasis supplied)

Thus, the disputes between the appellant and the respondent came to be referred to the arbitration as per the above-quoted order. It may be stated that the respondent, pursuant to the above order, also deposited Rs.25,000/- towards arbitration costs at the first instance within time fixed by the Court.

10. Learned 3rd Joint Civil Judge (S.D.), Vadodara, who heard applications Exh.5, 33, 34, 58, filed by the appellant for interim injunction and interim measures, disposed them by his common order dated March 30, 1999, inter alia, holding that interim measures prayed for by the appellant were covered under Section 9 of the Act, and that the Court having power under Section 9 of the Act is the principal court of original civil jurisdiction and that the Civil Court (S.D.) had no jurisdiction since it is not a Court under Section 9 of the Act.

11. The appellant, thereafter, filed Misc. Application No.70 of 1999 in the District Court, Vadodara, for interim measures as per the provisions of Section 9 of the Act. In paragraph 30, the appellant prayed, inter alia, for the following reliefs:-

(a) restrain the respondents by themselves, their servants, agents, etc. from in any manner selling, transferring or assigning including to their group/parent/associate/licensee company/ies, the assets both intangible and tangible, including intellectual property rights, know-how, drawings, toolings/machinery,

etc. and rights attached thereto, that are the subject matters of arbitration till final disposal of arbitration proceedings;

(b) pass necessary interim orders for preserving and protection of the properties in dispute which are the subject matters of arbitration."

12. The respondent contested the application for interim measures by filing affidavit in reply, inter alia, contending that no ground has been made out in the application for the reliefs as prayed for and the application was misconceived and required to be dismissed in limine, as the same suffered from gross delay and laches. It was averred that the appellant had no genuine desire to go to arbitration and was filing Misc. Application after Misc. Application only with a view to pressurize or blackmail the respondent. It was further averred that the application for interim measures/injunction was filed nearly after eight years of having come to know of the alleged fraud committed by the respondent and the appellant has not come to the Court with clean hands and has suppressed vital documents. It was also contended in the reply that the application for interim reliefs/measures proceeded on the basis that the appellant was entitled to mandatory reliefs directing the respondent to perform obligations under the agreement ignoring the settled principle that the mandatory relief of this nature can never be granted at the ad-interim stage and can only be granted at the time of decree. It was also averred that no prima facie case was made out by the appellant and the balance of convenience was also not in its favour. The respondent also averred that it has completed sale of textile machinery component division and, therefore, the application has now become infructuous and the only remedy of the appellant for its alleged claim is to claim damages. It was denied by the respondent that it had made any deliberate and/or fraudulent misrepresentation to the appellant. In the reply it was further contended that the appellant was aware of the alleged new designs of Product Group No.X on September 24, 1991 and, in fact, it had specifically sought supply of this very component as far back as in the year 1994. With regard to sale of respondent's textile machinery components business, it was stated in the reply that it had sold all its intangible and tangible assets of its ring-spinning business as per contract dated March 26/31,1999 with transfer effect April 6, 1999 and the assets of its textile machinery components business in Singapore will be sold in due

course. That the respondent's division of SKF Bearings India Ltd will not be affected but continues its present business for the time being. The purchaser of the German assets is the German-based company TEXparts GmbH, SKF TMC reserved the right to use a certain range of the ring-spinning production know-how. That, except India, there is no further business of the respondent in this field, but the company still continues to exist on a solid financial basis. It was further averred that the respondent had challenged the order dated January 2, 1999 of the learned Civil Judge (S.D), Vadodara, by way of revision proceedings in the High Court, which came to be rejected on January 27, 1999, and the said decision of the High Court was challenged in the Supreme Court by way of Special Leave Petition. It was stated that the said order was challenged in higher forums because as per the legal provisions, grant of any relief under the Act would be by way of a petition under Section 9 of the Act and not otherwise. It was stated that, as this position was disputed by the appellant, the respondent had to challenge the said order of the Civil Court in the High Court as well as in the Supreme Court. It is submitted that, ultimately, the learned Civil Judge (S.D.), Vadodara, had passed order on March 30, 1999 that the Civil Court had no jurisdiction to pass orders for interim measures and the correct procedure was to file application under Section 9 of the Act. Lastly, it was contended that the appellant had no prima facie case nor balance of convenience in its favour and no irreparable loss would be caused to it. It is further contended that the application suffers from the vice of gross delay, laches, and acquiescence and, hence, the application be dismissed.

13. The appellant filed its rejoinder to the affidavit in reply filed by the respondent on April 28, 1999, inter alia, denying all the allegations and the claims made in the affidavit in reply, and reiterated the averments made in the application filed under Section 9 of the Act. In the rejoinder, the appellant contended that the amendment agreement was entered into between the parties as a result of misrepresentation and fraud committed by the respondent. It was further contended that the respondent, with deliberate and mala fide intention, was disposing of its textile component business with a view to deprive the appellant of the monetary claims, which may be awarded in the arbitration proceedings. It was stated that the appellant's factory is not shut down as wrongly stated by the respondent. However, it was true that the appellant-company is financially 'sick' as a result its Baroda and Dharwad

Units are functioning at a bare minimum capacity utilisation and the appellant is registered with BIFR since February 1998.

14. Learned District Judge, Vadodara, who heard Misc. Application No.70 of 1999, by his judgment and order dated May 12,1999, dismissed the application filed under Section 9 of the Act holding that the appellant had no prima facie case and the balance of convenience was not in its favour and the appellant had not come with clean hands and the appellant was not going to suffer any irreparable loss which cannot be compensated in terms of money and, hence, it was not entitled to any equitable and discretionary relief of injunction, which order has given rise to filing of this appeal.

15. Civil Application No.4841 of 1999 is filed by the appellant for ad-interim reliefs pending hearing and final disposal of the First Appeal. In this application, order of status quo which was granted by the District Court, Vadodara, came to be extended till the pronouncement of the judgment of this appeal.

16. Civil Application No.6068 of 1999 is filed by the appellant for production of documents and has prayed for following reliefs:

"A. Your Lordships may be pleased to direct that any and all assets, both tangible and/or intangible and rights attached thereto relating to Product Groups I, II, III, IV and X of the Collaboration Agreement, dated 12.9.1989, including in particular those items specifically mentioned in the statement of claims raised in arbitration, including all products/product rights know-how/intellectual property rights, patents/patent rights, trade marks/trade mark rights, designations/nomenclatures, machinery, tools and dyes, testing equipment, etc. that have in any manner, directly or indirectly, been sold/transferred/assigned/disposed of etc. to TEXParts GmbH and/or to any other party including their group's Indian subsidiary, SKF Bearing India Ltd, to the extent that such sale/transfer etc. in any manner affects any of the claims/demands in arbitration, be detained under the custody of this Honourable Court, and no transfer and/or use of the same be permitted by TEXParts GmbH and/or its nominees/agents, licensees, etc. that may affect any of the rights of the applicant under dispute in arbitration.

(B) Your Lordships may be pleased to direct the respondent to disclose on affidavit before this Hon'ble

Court the complete details and particulars of its sale/transfer etc. to TEXParts GmbH, including item-wise and designation-wise details of all products/product rights, know-how/intellectual property rights, patents/patent rights, trademarks/trademark rights, nomenclatures, machinery, tools and dies, testing equipment, etc. related to Product Groups I, II, III, IV and X of the Collaboration Agreement, including their improvements and modifications, minor and major in particular all items specifically mentioned in the statements of claims raised in arbitration;

(C) Your Lordships may be pleased to direct the opponents to state on affidavit before this Honourable Court whether any manufacturing and/or marketing rights connected to any of the assets mentioned in prayers A, and B, above have been sold/transferred/disposed off, etc. within the geographical territory of India and neighbouring countries, as defined in the Collaboration Agreement dated 12.9.1989.

(D) Pending the hearing and final decision of the aforesaid First Appeal No.3109 of 1999, the opponent company and/or persons claiming rights pursuant to the agreement dated 26.3.99, on such other agreement, and also their nominees/agents/licensees, etc. be restrained from marketing any of the products mentioned in A and B above in the geographical territory defined in the said Collaboration Agreement dated 12.9.1989."

Both the applications were ordered to be heard along with the First Appeal and, therefore, they are disposed of by this judgment.

17. Learned Senior Counsel for the appellant and the respondent have supplied relevant documents at the time of hearing of this appeal and, therefore, the Court thought it fit not to call for record and proceedings from the District Court, Vadodara. Learned Senior Counsel for both the parties have taken me through the relevant documents more particularly collaboration agreement and amendment agreement. The Court has also taken into consideration correspondence and other materials which were relied upon by the learned Senior Counsel for the parties at the time of hearing of this appeal.

18. Mr. S.I. Nanavati learned Senior Counsel appearing for the appellant has submitted that the appellant has a strong prima facie case at least in respect of Product Groups Nos. I to IV and is entitled

to claim specific performance thereof. It is contended that the words "non-exclusive rights" in place of 'exclusive rights' meant that both APS (appellant) and SKF (respondent) would be at liberty to manufacture and market the textile machinery components within the territory as defined in the agreement. In this connection, it is contended that the said words cannot be construed to mean that SKF would be entitled to manufacture and market the components of the said Product Group Nos. I to IV to the exclusion of the appellant's rights to manufacture and market textile machinery components of Produce Groups Nos. I to IV. Learned Senior Counsel also contended that, if the said meaning is given to the words 'non-exclusive rights', then, it would amount to deletion of all the product groups by virtue of the amendment agreement and implied termination, which is not the intention of the amendment agreement. It is, therefore, contended by learned Senior Counsel that the appellant has strong prima facie case and there are triable issues to be decided by the Arbitrators in the proceedings referred to them. Learned Senior Counsel for the appellant further submitted that the intention of the respondent is obviously dubious, because, by Collaboration Agreement, it had given exclusive rights to the appellant by misrepresentation and fraud, by executing Amendment Agreement, got the exclusive rights converted into non-exclusive rights. It is contended by learned Senior Counsel for the appellant that the appellant does not seek status quo with regard to the entire property of the respondent-company; what is sought to be protected is subject matter of arbitration proceedings, i.e. rights of the appellant in respect of the Product Group Nos. I to IV and X and the additional claim of compensation on account of not providing/delaying supply of technology for the said product groups. Learned Senior Counsel for the appellant further submitted that, if the reliefs as prayed for in the application filed under Section 9 of the Act are not granted in favour of the appellant, it would suffer undue hardship and irreparable injury. It is contended that, on the other hand, if the respondent is restrained from selling assets in any manner, no irreparable injury would be caused to it. Learned Senior Counsel for the appellant further submitted that the application for interim measures was not barred by delay, as the appellant came to know about the evil design of the respondent only in April 1995. In the alternative, learned Senior Counsel for the appellant submitted that the issue of delay can only be examined by the Arbitrators and not by the Civil Court in the proceedings under Section 9 of the Act. In the context of this

submission, learned Senior Counsel for the appellant submitted that any observation with regard to delay would only frustrate the object of enactment of Section 9 and would also render the arbitration proceedings infructuous as being time-barred. Learned Senior Counsel for the appellant further contended that the conduct of the respondent-company was objectionable and not the conduct of the appellant-company as held by the District Court. In this connection, learned Senior Counsel for the appellant submitted that during pendency of the suit in the trial court, the respondent had disposed of its textile machinery components business, which is a deliberate intention to deprive the appellant of the legal rights of monetary benefits that may be awarded at the end of the arbitration proceedings. Learned Senior Counsel for the appellant further submitted that the order of the District Court was illegal, against the evidence produced on the record, and perverse, because the learned District Judge has not taken into consideration the principles of grant of injunction, which were in favour of the appellant, and, therefore, the appeal may be allowed and the order of the District Court may be set aside.

19. Mr. S.I.Nanavati, learned Senior Counsel for the appellant submitted, in support of Civil Application No.6068 of 1999 for production of documents, that the prayer for production of documents was justified in view of the subsequent development dated June 1, 1999 on which date despite sale of said textile machinery components business, the SKF had its own stall at the International Exhibition of Textile Machinery (ITMA-99) in Germany. It is submitted that the brochures were distributed at ITMA-99 by Texparts to circumvent the order of status quo of this Court. Further, the said components carry logo of SKF which can only lead to unavoidable conclusion that averment of sale in the affidavit dated April 18, 1999 is only an eye-wash angled at frustrating the interim relief prayed for by the appellant for preserving the subject matter of arbitration proceedings. Learned Senior Counsel for the appellant therefore submitted that the application for production of documents be allowed.

20 Mr. Dushyant Dave learned Senior Counsel appearing for the respondent on the other hand argued that in an appeal under Section 37 of the Act, the scope of the Appellate Court is very limited and the order of the District Court will not be interfered with except when discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court had ignored settled principles of law regulating

grant or refusal of interlocutory injunction. It is submitted that the learned District Judge has taken into consideration the entire material produced before him and also the principles of law argued before him and, thereafter, he passed reasoned judgment, which cannot be called perverse.

21. Learned Senior Counsel for the respondent further submitted that the appellant has failed to establish prima facie case. In this connection, it is submitted that the appellant who claims to have been defrauded by amendment agreement had not initiated any action within three years of alleged fraud of September 24, 1991 or in April 1994 as per the appellant's own admission and the material on record. Learned Senior Counsel for the respondent submitted that under Section 62 of the Indian Contract Act, 1872, the obligation under the original agreement need not be performed if it is altered. Learned Senior Counsel for the respondent further contended that under Section 66 of the Indian Contract Act, mode of rescission of voidable contract is to revoke it by communication, but no such communication of rescission of voidable contract was communicated by the appellant to the respondent. It is, therefore, contended by learned Senior Counsel that the amendment agreement must survive and the parties to the agreement are bound by it. It is submitted by the learned Senior Counsel for the respondent that the grant of any interim injunction or interim measure or status quo would amount to obliterating the amendment agreement and thereby keeping the original agreement alive, which cannot be done.

22. Learned Senior Counsel for the respondent submitted that the appellant had failed to show any balance of convenience in its favour as correctly held by the learned District Judge because the appellant had slept over its right, if any, for eight years and, in equity, the appellant cannot claim any such balance of convenience. It is submitted that, on the contrary, the balance of convenience was in favour of the respondent which, pursuant to the amendment agreement, has absolute right to deal with technical information in respect of the Products Group Nos. I to XI. In this connection, the learned Senior Counsel for the respondent further submitted that the appellant does not have any exclusivity after September 23, 1991 to any such information in India and, therefore, grave inconvenience and irreparable loss, harm, and injury would be caused to the respondent if any interim orders are passed in favour of the appellant.

23. Learned Senior Counsel for the respondent further submitted that there is no irreparable injury likely to be caused to the appellant except its rights under Collaboration Agreement of September 12, 1989 as amended by amendment agreement of September 23, 1991. In this connection, it is submitted that in the event of applicant succeeding in the arbitration proceedings, it can easily be compensated in terms of money. Learned Senior Counsel for the respondent submitted that the principle for grant of injunction will be applicable while making orders under Section 9 of the Act as held by the Delhi High Court in its decisions in the cases of M/s. Global Company vs. M/s. National Fertilizers Ltd, AIR 1998 Delhi 397, and B.S.M Contractors Pvt. Ltd. vs. Rajasthan State Bridge & Construction Corporation Ltd., AIR 1999 Delhi 117.

24. In the alternative, learned Senior Counsel for the respondent submitted that even if all the factors were present in favour of the appellant, the Court would still refuse to grant injunction in favour of the appellant who is guilty of delay, laches and/or acquiescence. Learned Senior Counsel for the respondent, in support of the aforesaid contention, has placed reliance on the following decisions in the cases of - (i) National Airport Authority vs. Vijaydutt; AIR 1990 MP 326; (ii) Indian Express Newspapers (Bombay) Pvt. Ltd vs. Dr. Jagmohan Mundhara; AIR 1985 Bom 229; and (iii) Associated Cement Companies Ltd vs. The State of Rajasthan and another; AIR 1981 Raj.133. Learned Senior Counsel for the respondent has further submitted that injunction is an equitable remedy and the Court of equity will not aid a litigant who approaches it with unclean hands by withholding correct information and/or by suppressing documents. Learned Counsel submitted that the appellant's own documents establish that it had known since April 1994 that the respondent was selling Product Group X, which fact was withheld from the Court. Learned Counsel pointed out that these documents were vital, yet the appellant failed to refer them. Even though these documents were referred by the respondent in his reply, the appellant in its rejoinder does not dispute this position. In support of this submission, learned Senior Counsel for the respondent placed reliance on the decision of the Apex Court in the case of S.P.Chengalvaraya Naidu vs. Jagnnath AIR 1994 SC 853.

25. Learned Senior Counsel for the respondent incidentally argued that the appellant was rightly non-suited by the learned District Judge in its application under Section 9 of the Act because the

learned Judge has found and correctly held that the appellant was resorting to legal proceedings one after another and was indulging in abuse of process of Court. In support of this submission, learned Senior Counsel for the respondent has placed reliance of the decision of the Apex Court in the case of Bloom Dekor Ltd vs. Subhash Himatlal Desai and others (1994) 6 SCC 332; and the decision of this Court in the case of Bhagwansingh Thakker vs. V. Pravinchandra J. Patadia, 1995 (2) GLH 726. Learned Senior Counsel for the respondent has vehemently argued that there was lack of manifest intention on the part of the appellant to go for arbitration and, therefore, the learned District Judge correctly found that the appellant was not entitled to any relief under Section 9 of the Act. In support of this submission, the learned counsel for the respondent placed reliance on the decision of the Apex Court in the case of Sundaram Finance Ltd vs. NEPC India Limited, AIR 1999 Supreme Court 565.

26. Mr. Dave, learned counsel for the respondent, vehemently submitted that the order of the learned District Judge cannot be called perverse and the appellant had no case for grant of any order of interim measures under Section 9 of the Act and, therefore, the appeal be dismissed with costs.

27. With regard to Civil Application No. 6068 of 1999 for production of documents, it is submitted by the learned Senior Counsel for the respondent that the appellant has not shown to the Court under which provision the application is filed. It is contended that, if the application is filed under O.11 Rule 14 of the Code, the application does not lie in the appellate court as the provisions of O.11 Rule 14 of the Code would be applicable only to pending suits. It is further contended that the additional evidence can never be permitted to be produced at the appellate stage under the provisions of O.41 Rule 27 of the Code. It is contended that none of the conditions of clauses (a) to (b) of Rule 27 (1) of Order 41 is satisfied and, therefore, the application is liable to be dismissed. It is further contended that the additional evidence cannot be produced at the appellate stage as per the decision of the Apex Court in N.R. Dongre vs. Whirlpool Corporation, (1996) 5 SCC 714. It is also contended by the learned Senior Counsel that the respondent, in its reply, has specifically stated that they had sold away textile machinery components business by sale deed dated March 26/31, 1999, but the appellant never tried to seek production or inspection of the sale deed in the trial

court and, therefore, they cannot, at the appellate stage, seek production or inspection of the said document of sale, and, therefore, Civil Application No.6068 of 1999 deserves to be dismissed.

28. Before dealing with the contentions of the learned Senior Counsel appearing for both the parties, it would be appropriate to set out important clauses of the Collaboration Agreement as well as the Amendment Agreement. Article II, which relates to 'grant of rights', reads as under:

"2.1 The German Company accords the Indian Company the entire right to manufacture contract products in the Territory market the same anywhere in the world, subject to what is contained herein including the provisions of Article X. The said exclusive right comes into effect not before the date on which the German Company has become a substantial holder in the Indian Company and for this purpose, at first instance the German Company have acquired holds not less than 13.991 of the issued and paid up share capital of the Indian Company.

2.2 It is however understood that the said exclusive right shall be in respect of each item of the different product groups and if commercial production of items is not commenced within a period of 1 year according to the detailed plan schedule for commencement of regular commercial production or each item as set out in Annexure No.2 hereto or any modification as mutually agreed upon in writing in respect of such item, for reasons attributable to the Indian Company, it will be open to the German Company to convert the said exclusive right into non-exclusive one in respect of such item after giving a notice thereof in writing of a period of minimum 6 months.

2.3 The lumpsum payments envisaged in this Agreement as related individually to each item of different product groups as stated in Annexure 6 if paid by the Indian Company to the German Company shall constitute full compensation for use of the related patent rights, technical data and technical knowhow applicable to the manufacture of contract product, and the Indian Company shall be free to use such technical data and technical knowhow in the manufacture of related contract products subject to the terms and conditions of this Agreement.

2.4 The German Company agrees that it shall not during the term of this Agreement and for a period of one

year thereafter subject to paragraph 2.1 and 2.2 above engage itself in or be financially or technically interested in any other tie-up or venture in the Territory for the manufacture of products which are similar to or competitive with the contract products without the prior written permission of the Indian Company provided however, the German Company shall be entitled to continue its existing tie-up with respect to such item/items forming parts of the said products where and so long as Indian Company has not commenced commercial production of such item/items of contract products.

2.5 x x x xx "

28.1 Article XX refers to arbitration wherein it is provided that in the event of any dispute or difference between the parties hereto whether arising during the currency or after the determination thereof (whether for breach or for any other reason) in regard to any matter or thing of whatsoever nature arising out of this Agreement or in connection therewith, then either party shall give to the other notice in writing of such dispute or difference and the same shall be settled by arbitration in Bombay by the Indo-German Chamber of Commerce in accordance with their rule of arbitration and conciliation.

28.2 Article XXIV, in paragraph 24.1, provides that, "this agreement shall not be amended, altered or modified, except by an instrument in writing expressly referring to this Agreement and signed by the parties hereto and approved where necessary by the Government of India". Pursuant to Article XXIV, and in view of the international situation in regard to contract products, the worldwide competition in respect thereof, demand therefore in India, costs and viability and other economic factors, the German Company and the Indian Company had agreed to alter the Collaboration Agreement in particular to vary certain clauses relating to exclusive rights and the contract products as mentioned therein, and as such the Collaboration Agreement came to be amended on September 23, 1991. By clause (iv) of the Amendment Agreement, the appellant and the respondent agreed to delete Product Group Nos. V to IX and XI from the purview of the Collaboration Agreement as there was no demand at that point of time or expected demand in future in India for the items falling under the said product groups. By clause (v) of the Amendment Agreement, it was agreed between the parties that no new or improved designs are available or likely to be available in the near future for the items falling under

Product Group No.X and the parties accordingly agree to delete the said Product Group No.X from the Annexure I to 8 of the Collaboration Agreement and, accordingly, the Indian Company shall not be liable to make payment of any knowhow fees in respect thereof.

28.3 Clause (ix) of the Amendment Agreement reads as under:

"(ix) The wordings 'exclusive rights' wherever appearing in the Collaboration Agreement and in particular in Articles II Nos. 2.1, 2.2 and IV No.4.1 are hereby deleted and substituted by the words 'non-exclusive rights'. Furthermore, Article II No.2.4 and 2.5 of the Collaboration Agreement are hereby deleted. Any other Article of the Collaboration Agreement shall be read, interpreted and applied in line with and in conformity with this Agreement."

Reading the abovereferred to Articles and clauses of the Amendment Agreement, it is evident that Product Group Nos. V to IX and XI came to be deleted from the Collaboration Agreement in view of the reasons stated in paragraph 3 of the Collaboration Agreement. As no new or improved designs were available or likely to be available in the near future for the items falling under Product Group No.X, both the companies agreed to delete said Product Group No.X from Annexure 1 to 8 of the Collaboration Agreement. Obviously, the Indian Company was not liable to make any fees in respect thereof. The most important feature of the Amendment Agreement is that exclusive rights granted earlier to the Indian Company as mentioned in Articles II Nos. 2.1, 2.2 and IV No.4.1 of the Collaboration Agreement came to be deleted and were substituted by words 'non-exclusive rights'. As a result of the Amendment Agreement, the appellant had no exclusive rights over the new products of the respondent and the respondent was not liable to provide technical knowhow of those products to the appellant.

29. The appellant, by filing Application No.70 of 1999, in the District Court, Vadodara, had prayed for an injunction restraining the respondent by way of an interim order from in any manner selling, transferring or assigning including to their group/parent/associate/licensee company/ies, the assets both intangible and tangible, including intellectual property rights, know-how, drawings, toolings/machinery, etc. and rights attached thereto, that are the subject matters of arbitration. Apparently, this prayer is for an interim injunction pending arbitral proceedings before the Indo-German Chamber of Commerce.

30. The question, which arises, is whether the settled principles of law regulating grant or refusal to grant of interlocutory injunction enunciated under the provisions of the Code would apply to orders of interim measures which can be passed under Section 9 of the Act ?

31. In the case of M/s.Global Company vs. M/s. National Fertilizers Ltd. AIR 1998 Delhi 397, the question arose before the Delhi High Court whether in view of repeal of the Arbitration Act, 1940 by the Act of 1996, the provisions of Code of Civil Procedure are not applicable to the proceedings under the Act. The High Court held that, in the absence of guidelines how the power for grant of relief under Section 9(ii)(b) is to be exercised by the Court, the principles underlying Order 38 Rule 5 of the Code can be applied only on adequate material being supplied by the petitioner, so that the Court can form opinion that unless the jurisdiction is exercised under the said Section 9(ii) there is real danger of the respondent defeating, delaying or obstructing the execution of the award made against it. It was held that, on the basis of only ground of protection of financial interest of the petitioner, the respondent-Government of India Undertaking cannot be legally directed to furnish security. In B.S.M. Contractors Pvt Ltd. vs. Rajasthan State Bridge and Construction Corporation Ltd. AIR 1999 Delhi 117, the Delhi High Court refused to grant interim injunction under Section 9 of the Act in favour of the petitioner on the ground that neither did the balance of convenience lie in favour of the petitioner nor prima facie case was made out. In view of the abovereferred to two decisions of the Delhi High Court, in my view, while granting interim measures in form of interim injunction, the provisions of the Code of Civil Procedure and salient principles of grant or refusal to grant of an injunction will have to be kept in mind by Court/Arbitrators at the time of passing orders of interim measures of protection under Section 9 of the Act. In light of the above principles, it will have to be examined whether the appellant has made out prima facie case or balance of convenience is in favour of the appellant or any irreparable loss or injury will be caused to it, to obtain any orders under Section 9 of the Act.

32. It should not be lost out of sight that the present appeal under Section 37 of the Arbitration & Conciliation Act, 1996 is directed against the order passed by the District Court, Vadodara, under Section 9 of the Act refusing to exercise discretion to grant

interim measures of protection. Obviously, the scope of the appellate court is very limited. The appellate court will not interfere with the order except when discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court has ignored settled principles of law regulating grant or refusal to grant of interlocutory injunction. [See:Wander Limited and others vs. Antox Private Limited, 1990 (Supplement) SCC 727]

PRIMA FACIE CASE

33. By the Collaboration Agreement, the respondent had agreed to supply technical know-how of Product Group Nos. I to XI to the appellant. By Amendment Agreement of September 23, 1991, Product Group Nos. V to IX and XI came to be deleted on account of non-availability of demand and economic factors. As no new or improved designs were available or likely to be available in the near future for the items falling under Product Group No.X, the appellant and the respondent have agreed to delete Product Group No.X from the Annexure 1 and 8 of the Collaboration Agreement and, accordingly, the appellant was not liable to make payment of any knowhow fees in respect thereof. In view of the Amendment Agreement, the appellant cannot claim any right to have technical know-how of Product Group Nos. V to IX and X and XI. However, learned Senior Counsel for the appellant vehemently urged that they have good prima facie case with respect to Product Group Nos. I to IV as these items were intact and were not disturbed or deleted from the Amendment Agreement and, therefore, the appellant was entitled to claim 'specific performance' of the Collaboration Agreement with respect to non-supply of technical know-how of items falling under Product Group Nos. I to IV. In my view, by Amendment Agreement, exclusive rights conferred on the appellant were, admittedly, converted into non-exclusive rights. In view of the substitution of 'exclusive right' by 'non-exclusive right' under the Amendment Agreement, the appellant cannot claim as a matter of right to have technical know-how in respect of items covered under Product Group Nos. I to IV. Learned Senior Counsel for the appellant has urged that the amendment agreement is under challenge before the Arbitrators on the ground that there was misrepresentation by the respondent and that fraud was committed as a result of which the amendment agreement came to be executed on September 23,1991. In this regard, it is submitted that, even though new or improved designs were available and likely to be available in near future with regard to items falling

under Product Group No.X, the respondent had misrepresented before the appellant to the contrary. It is urged that, in the exhibition which was held in Hannover in Germany on September 24, 1991, the main items of Product Group No.X were displayed by the respondent and, therefore, it should be presumed that the respondent by making fraudulent misrepresentation got the Amendment Agreement executed between the parties. Learned Senior Counsel for the appellant also urged that in April 1995 the appellant came to know that the respondent was selling products of textile components to different companies in India in breach of the Collaboration Agreement and, therefore, the appellant has a prima facie case to show that the Amendment Agreement was executed by misrepresentation and fraud. Learned Senior Counsel for the appellant urged that the respondent is selling and disposing of their textile machinery component division with deliberate intention to frustrate any reliefs that may be finally granted by the Arbitrators in favour of the appellant. It is, therefore, urged that the appellant has got strong prima facie case in their favour and the injunction, as prayed for, should be granted.

34. The above submissions of learned Senior Counsel for the appellant cannot be accepted. The appellant had never voided the Amendment Agreement even though it claims to have been defrauded. The appellant came to know of misrepresentation by the respondent in September 1991 itself when they came to know about the news items that the textile components of Product Group No.X came to be displayed at Hanover Fair in Germany. If the Amendment Agreement was a voidable contract, the appellant, by communication, ought to have revoked it. The appellant slept over from 1991 to 1998 and did not revoke the Amendment Agreement, which, according to them, was tainted with misrepresentation and fraud. It is well established principle that a contract or other transaction induced or tainted by fraud is not void, but only voidable at the option of the party defrauded. Until it is voided, the transaction is valid. The fact that the contract has been induced by fraud does not make the contract void or prevent the property from passing, but merely gives the party defrauded a right on discovering the fraud to elect whether he shall continue to treat the contract as binding or disaffirm the contract and resume the property. {See: Nangawa Vs. Byrappa & Others, 1968(2) SCR 797}. The Collaboration Agreement contained clause that the said agreement can be amended, altered or modified by an instrument in writing expressly referring to the agreement and signed by the parties thereto. The appellant and the respondent are

leading companies in the world dealing in manufacture and business of textile components. Before signing the Amendment Agreement, they must have been assisted by their senior executives and experts in the field. The appellant, with its eyes open, and after thoroughly discussing the clauses of the Amendment Agreement, had entered into it. The terms of the Amendment Agreement might have been proved to be more onerous to the appellant, but that would not vitiate the Amendment Agreement on the ground that it is tainted with misrepresentation and/or fraud. {See: AIR 1965 Supreme Court 470: M/s. M.Hassanji & Sons vs. State of Madhya Pradesh - para 10 at page 472}. The documentary evidence produced on the record show that the appellant came to know that new and improved designs of textile components of Product Group No.X were displayed in Hannover Fair in Germany in the year 1991 and further correspondence entered into between the appellant and the respondent reveals that the respondent had sold textile components to Mafatlal Industries through Sovereign Engineering in the year 1994, even then, they did not initiate any action against the respondent for the alleged breach of the Collaboration Agreement or for specific performance of the Collaboration Agreement. In view of these facts, it cannot be said that the appellant has prima facie case in its favour and there are triable issues involved in the proceeding. The finding of the learned District Judge that the appellant has no prima facie case is quite just and proper and does not call for any interference in this appeal.

BALANCE OF CONVENIENCE

35. It is strenuously urged by learned Senior Counsel for the appellant that the appellant having acquired knowledge in April 1995 about misrepresentation and fraud committed by the respondent in getting Amendment Agreement executed in the year 1991, filed Regular Civil Suit No.211 of 1998 in the Court of Civil Judge (S.D.), Vadodara, for declaration and injunction and for specific performance of the Collaboration Agreement and to declare the Amendment Agreement of September 23, 1991 void and illegal on the ground that it was tainted with fraudulent misrepresentation. It is submitted by learned Senior Counsel for the appellant that, as the Amendment Agreement was executed by misrepresentation and fraud on the appellant, the respondent cannot be permitted to take advantage of its own wrong and cannot be permitted to alienate or sell/transfer assets just to deprive the

appellant of the result of the arbitration proceedings. It is contended by learned Senior Counsel that, under the Collaboration Agreement, which is still alive, the appellant was entitled to have technical know how of items of Product Groups I to IV. In this connection, it is submitted by learned Senior Counsel for the appellant that no inconvenience would be caused to the respondent if the rights of the appellant are protected till final decision of the Arbitrators.

36. In my view, none of the submissions of learned Senior Counsel for the appellant deserve any merit. The appellant, having slept over its rights, if any, for nearly eight years, cannot claim balance of convenience in its favour. After the Amendment Agreement of 1991, exclusive rights were substituted by non-exclusive rights. The resultant effect of it is that the appellant had no absolute right to have technical know how in respect of items covered by Product Groups Nos. I to IV. Moreover, the appellant cannot claim any exclusivity after the Amendment Agreement to any such information in India. The appellant with their eyes open had entered into Amendment Agreement in the year 1991. Even though they came to know that the Amendment Agreement was tainted with misrepresentation and fraud, they did not revoke the Amendment Agreement, which according to them was voidable. The result is that till the Amendment Agreement is declared as void contract, it is valid and subsisting. The appellant, after the Amendment Agreement, has no exclusive right to have technical know-how of textile components of Product Group No. I to IV. The respondent was at liberty to provide technical know-how of textile components of Product Group Nos. I to IV to other buyers after the Amendment Agreement of 1991. By Amendment Agreement, the respondent acquired absolute right to deal with technical information in respect of all products of Group I to Group XI. On the contrary, if injunction is granted in favour of the appellant, grave inconvenience would be caused to the respondent. The learned District Judge has also held that the balance of convenience was not in favour of the appellant and, in my opinion, that finding cannot be called perverse or against the weightage of evidence and, therefore, the said finding deserves to be confirmed.

IRREPARABLE INJURY AND UNDUE HARDSHIP

37. It is strenuously urged by learned Senior Counsel for the appellant that the appellant had incurred

substantive losses on account of non-transfer or delayed transfer of technical know-how for which the appellant has lodged his claim before the Arbitrators. It is further urged that, if the technical know-how for manufacture of items under Product Group Nos. I to IV and X under the Collaboration Agreement is transferred to buyers in breach of the appellant's right and in the event of its success at the end of the arbitration proceedings, they would suffer irreparable loss and hardship and, therefore, the injunction as prayed for should be granted. It is contended that, on the other hand, if the respondent is restrained from selling assets in any manner which would be in breach of the appellant's rights under the Collaboration agreement, more particularly for Product Group Nos. I to IV, no irreparable injury would be caused to the respondent. In my opinion, the contentions of learned Senior Counsel for the appellant deserve to be rejected because in the event of appellant succeeding in the arbitration proceedings, it can adequately be compensated in terms of money. In the case of M/s.Gujarat Bottling Co. Ltd vs. Coca Cola Ltd, AIR 1995 Supreme Court 2373, the Apex Court, in paragraph 46, has observed that the grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising the discretion the Court applies the following test - (1) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. It is further observed that the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.

38. The appellant has challenged the Amendment Agreement on the ground that it is tainted with misrepresentation and fraud and has sought specific performance of Collaboration Agreement. In the ultimate result before the Arbitrators, if the Amendment Agreement is declared void and if the appellant is entitled to any reliefs under the Collaboration Agreement, then they can be compensated in terms of money. Section 14 of the Specific Relief Act, 1963 provides that a contract for the nonperformance of which compensation in terms of money is an adequate relief, then such contract cannot be specifically enforced. Section 21 of the Specific Relief

Act, 1963 also empowers the Court to award compensation instead of granting specific performance of the contract. In the ultimate result, if the Arbitrators decide that there is breach of Collaboration Agreement with regard to Product Group Nos. I to IV, the appellant can be compensated in terms of money. The submission of learned Senior Counsel for the appellant that assessment of damage and quantification thereof would be an impossibility and cannot be an effective remedy of compensation by way of damages in the ultimate success of the appellant, is also devoid of any merit. As observed earlier, by Amendment Agreement, the appellant had lost its exclusive rights over Product Group Nos I to IV. After the Amendment Agreement, the appellant cannot claim technical know-how of Product Group Nos. I to IV as a matter of right and it was open for the respondent to provide technical know-how and sell textile components of Product Group Nos. I to IV to any other buyer. Until the Amendment Agreement is declared void, it remains valid and is subsisting and the respondent cannot be restrained from selling their textile components and technical know-how to other buyers in the market. In the event the appellant succeeds, they can be adequately compensated in terms of money. The apprehension of the appellant that, if the respondent has sold all tangible and intangible assets of its textile products, which were subject matter of the Collaboration Agreement, the appellant would suffer irreparable loss in the event of its success at the end of the arbitration proceedings, in my view, is misplaced. The respondent, in the District Court, filed its affidavit in reply, which was duly sworn by Mr. Hans Adams, Deputy Managing Director of the respondent-company and, in paragraph 13, it was stated that, "except India, there is no further business of the respondent in this field but the Company still continues to exist on a solid financial basis". In view of this specific statement made on oath by the deponent, who is Deputy Managing Director of the respondent-company, in my view, in the event the appellant succeeding at the end of the arbitration proceedings, it can adequately be compensated in terms of money which can be recovered from the respondent. Therefore, it cannot be said that irreparable loss and hardship would be caused to the appellant if the injunction is not granted in its favour. On the contrary, if the injunction is granted in favour of the appellant, it would cause irreparable loss and hardship to the respondent. The finding of the learned District Judge in this regard is eminently just, proper and does not call for any interference in this appeal.

39. Learned Senior Counsel for the appellant has also

vehemently contended that the judgment and order of learned District Judge is perverse and, therefore, it requires to be quashed and set aside. On the other hand, it is contended by learned Senior Counsel for the respondent that learned District Judge had taken into consideration relevant factors governing grant or refusal to grant injunction and had also taken into consideration the relevant documentary evidence produced by the parties and had given its decision on all points and, therefore, it cannot be said that the impugned judgment and order is perverse.

40. A decision can be called perverse only if the Court has committed grave error in appreciation of evidence and misdirected itself by ignoring legal principles or misleading evidence and arrived at the conclusion. (See: Mool Chand vs. Jagdish Singh Bedi and others; 1993 Supp. (2) Supreme Court Cases 714). Learned Senior Counsel for the appellant, however, placed reliance on the decision of the Karnataka High Court in M.S.Narayanagouda vs. Smt. Girijamma and another, AIR 1977 Karnataka 58, wherein it is held that the order made in conscious violation of pleadings and law is a perverse order, and a perverse order made in contravention of the basic principles of rules of natural justice cannot be allowed to stand uncorrected. In my opinion, by no stretch of imagination, the order of learned District Judge can be called a perverse order, which is passed in conscious violation of the pleadings and law. Learned District Judge had taken into consideration all the pleadings, affidavits and evidence produced before him and passed reasoned order refusing interim measures to the appellant, as learned District Judge found that the appellant had no prima facie case, no balance of convenience lies in its favour, and no irreparable injury would be caused to it. The salient principles, as propounded by the Apex Court in catena of decisions, to be observed while granting or refusing to grant interim injunction, have been kept in mind by learned District Judge at the time of deciding application filed by the appellant under Section 9 of the Act. In this view of the matter, the order of learned District Judge cannot be called perverse and I do not find any merit in the submissions of learned Senior Counsel for the appellant that the order of learned District Judge is perverse and deserves to be quashed and set aside.

DELAY AND CONDUCT OF THE APPELLANT

41. Learned Senior Counsel for the respondent has strenuously urged that the appellant has approached the Court after inordinate delay and their conduct is such that they are not entitled to discretionary and equitable relief of injunction. It is urged that there are contradictions in the pleadings of the appellant before the District Court as to when they came to know about misrepresentation or fraud. It is urged that, in one breath, the appellant states that it was only in April 1995 that it came to know of having been defrauded while the correspondence produced by the respondent shows that in the letter dated April 6, 1994, the President of the appellant-company had declared that the respondent-company was offering and selling textile components to other manufacturers. Learned Senior Counsel for the respondent also pointed out that the appellant came to know that in the fair of Hannover in Germany on September 24, 1991, new and improved items of Product Group No.X were displayed. Therefore, learned Senior Counsel for the respondent urged that initiation of legal proceedings of declaring Amendment Agreement void and for specific performance of Collaboration Agreement is filed after lapse of eight years and, therefore, the appellant is not entitled to any discretionary relief. Learned Senior Counsel for the respondent relied on the judgments in National Airport Authority and others vs. Vijaydutt, AIR 1990 MP 326, Indian Express Newspapers (Bombay) Pvt. Ltd. vs. Dr. Jagmohan Mundhara and another, AIR 1985 Bom 229 and Associated Cement Companies Ltd vs. The State of Rajasthan and another, AIR 1981 Raj.133, in support of the contention that the Court would refuse to grant interim injunction to a party who is guilty of delay, laches and/or acquiescence. Learned Senior Counsel for the respondent further urged that the learned District Judge has rightly concluded that the appellant was not entitled to any interim protection as it had approached the Court belatedly and after having failed before other Forums, i.e. MRTP Commission and Civil Judge (S.D.), Vadodara, between December 1997 and March 1999. On the other hand, learned Senior Counsel for the appellant submitted that display of top arms and cradles at the international exhibition of ITMA on September 24, 1991 at Hannover in Germany, was only a promotional exercise and the respondent had assured that it had no intention of manufacturing the same, as the said product required a lot of testing prior to putting it on commercial basis in the open market. It is urged that, on the said assurance, the appellant had not taken any objection. It

is further urged that it was only in April 1995 that the appellant came to know of having been cheated as on one hand Product Group No.X was deleted from the purview of the Collaboration Agreement and not supplying technical know-how to the appellant of Product Group Nos. I to IV, and, at the same time, supplying it to other buyers. It is, therefore, urged that there is no inordinate delay in initiating legal proceedings and, therefore, the delay should not come in the way of the appellant in claiming injunction against the respondent. The learned Senior Counsel for the appellant urged that, on account of delay, injunction should not be refused to the appellant. In support of the submission, learned Senior Counsel for the appellant placed reliance on the decision of learned Single Judge of this Court in the case of Rupa & Company Ltd vs. Dawn Mills Co. Ltd. reported in 1999(1) Volume 40(1) GLR 744. As noted earlier, the appellant had acquired knowledge about alleged deliberate fraudulent misrepresentation for the first time on or after September 24, 1991 when new and improved designs of Product Group No.X came to be displayed in the exhibition at Hanover, in Germany, and, for the second time, in the year 1994 when the respondent sold its textile components in the open market and parted with technical know-how of Product Group Nos. I to IV to other buyers, yet the appellant did not initiate any proceedings to declare Amendment Agreement void or for specific performance of the Collaboration Agreement in the competent court or before the Arbitrators. Before approaching the Civil Court, the appellant had approached the MRTP and having failed there it ultimately filed Regular Civil Suit No.211 of 1998 in the Court of learned Civil Judge (S.D.), Vadodara. It will not be out of place to mention that, despite there being arbitration clause in the Collaboration Agreement, and, in clear breach of Section 5 of the Act, the appellant had filed Regular Civil Suit No.211 of 1998 in the Court of Civil Judge (S.D), Vadodara, without getting the dispute referred to the Arbitrators (Indo-German Chamber of Commerce) as provided in Article XX, clause 20.1, of the Collaboration Agreement. Looking to the inordinate delay and conduct of the appellant in approaching different forums for getting injunction in its favour, in my opinion, the appellant is not entitled to claim equitable and discretionary relief of injunction. The decision on which the reliance is placed by learned Senior Counsel for the appellant in the case of Rupa & Company (supra) will not be applicable to the facts of the present case. Learned single Judge, in the abovereferred to decision, had concluded that under ordinary law relief of temporary injunction cannot be refused solely on the ground of

delay or laches. In Rupa & Company's case (supra), learned single Judge was concerned with infringement of trade mark and in that connection the Court observed that inordinate delay might be there because the plaintiff might not be aware of the infringement of the defendant or the plaintiff might consider the infringement of the defendant is not serious enough to hurt the plaintiff's business. In that context, learned single judge held that delay or laches cannot be the sole ground for refusing relief of temporary injunction. In the case on hand, as noted earlier, the appellant having slept for nearly eight years after having acquired knowledge of fraudulent misrepresentation, had not initiated any action against the respondent. Moreover, other important factors are also against the appellant and the injunction is not merely refused on sole ground of delay and, therefore, in my view, the principles laid down in the case of Rupa & Company (supra) will not have any bearing on the facts of the present case. In my view, the finding of the learned District Judge that the appellant had approached the Court after inordinate delay is quite just and proper and does not call for any interference.

LACK OF MANIFEST INTENTION ON THE PART OF THE APPELLANT TO GO TO ARBITRATION

42. Mr. Dushyant Dave, learned Senior Counsel for the respondent, incidentally, urged that the present application is filed by the appellant under Section 9 of the Act for interim measures before or during arbitral proceedings. It is submitted that there was lack of manifest intention on the part of the appellant for arbitration and, even though there was express arbitration clause in the Collaboration Agreement, the appellant did not seek any reference to arbitration. It is submitted that the appellant has first resorted to MRTP proceedings, and, having failed to get any relief from the Commission, it moved the Supreme Court by filing Special Leave Petition wherein it failed in getting temporary injunction. It is also submitted that the appellant filed Regular Civil Suit No.211 of 1998 on February 19, 1998 and prosecuted applications for injunction vide Exh.5, 33, 34 and 58 right upto March 30, 1999 when they were dismissed as not maintainable by the Civil Judge (S.D), Vadodara. It is submitted that the appellant also opposed applications Exh.13 and Exh.23

filed by the respondent in March/April 1998 for referring the disputes to arbitration. It is further submitted that, even after the learned Civil Judge (S.D.), Vadodara, by his order dated January 2, 1998, referred the dispute to the Indo-German Chamber of Commerce, the appellant continued to insist that the Civil Court should decide the injunction applications filed by it even the Court of Civil Judge (S.D.) had no jurisdiction to pass orders of interim measures under Section 9 of the Act. In light of the above conduct of the appellant, learned Senior Counsel for the respondent submitted that the appellant had no manifest intention to go for arbitration and, therefore, the appellant was not entitled to any relief under Section 9 of the Act. Learned Senior Counsel for the respondent in support of the above submission relied on the observations of the Apex Court in the case of M/s. Sundaram Finance Limited vs. NEPC India Ltd, AIR 1999 Supreme Court 565 in paragraph 20 which are as under:

"If an application is so made the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied the Court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant."

(Emphasis supplied)

The conduct of the appellant, as pointed out by learned Senior Counsel for the respondent, in my view, lacks manifest intention to go for arbitration. The appellant never intended to go for arbitration even though there was an arbitration clause in the Collaboration Agreement. After the dispute was referred to the Arbitrators by the Civil Court on January 2, 1999 by orders passed below applications Exh.13 and 23 filed by the respondent, it would have been open for the appellant to file application for interim measures before the Arbitrators under Section 17 of the Act. Even though the appellant knew that the Civil Court was not a competent court to pass orders for interim measures under Section 9 of the Act, the appellant went on pressing and filing applications after applications for interim measures before the Civil Court and, ultimately, the Civil Court ordered that it had no jurisdiction to pass orders in the applications filed under Section 9 of the Act for interim measures. Only thereafter the appellant filed application for interim measures before the District Court. The appellant was rightly non-suited by the

learned District Judge upon its application under Section 9 of the Act on the ground that the appellant was resorting to legal proceedings one after another. If a litigant is permitted to indulge in such an abuse of court by resorting to legal proceedings one after other in different Courts, then his conduct requires to be seriously deprecated as held by the Apex Court in Bloom Dekor Ltd vs. Subhash Himatlal Desai and others, (1994) 6 Supreme Court Cases 332, which is followed by learned single Judge of this Court in Bhagwansingh Thakker vs. Pravinchandra, 1995 (2) GLH 726. Even though the dispute between the appellant and the respondent is referred to arbitration on January 2, 1999, the appellant has not withdrawn Civil Suit No.211 of 1998 from the Court of Civil Judge (S.D.),Vadodara. After the dispute is referred to arbitration in Civil Suit No.211 of 1998, the appellant has still not withdrawn the proceedings before the MRTTP and the Supreme Court. If such is the conduct of the appellant, then, in my view, the appellant is not entitled to any equitable or discretionary order. In the facts and circumstances of the case, as mentioned above, the order of temporary injunction, being equitable and discretionary relief, was rightly refused by learned District Judge on account of delay and laches.

43. Grant of interim measures/injunction in favour of the appellant under Section 9 of the Act would amount to holding the Amendment Agreement void and allowing final prayer which can only be granted at the end of the proceedings before the Arbitrators. The appellant has failed to establish a prima facie case and balance of convenience in its favour or that irreparable loss would be caused to it which cannot be compensated in terms of money if it succeeds at the end of the arbitration proceedings.

44. It is made clear that the findings recorded in this judgment are only for the limited purpose of deciding the question of grant of interim measures pending arbitration proceedings under Section 9 of the Act and the findings recorded shall not affect the rights and contentions of the parties that may be advanced in the proceedings before the Arbitrators.

45. As a result of the foregoing reasons, the appellant is not entitled to any interim measures or injunction of protection under Section 9 of the Act. The appeal is, therefore, dismissed with costs.

CIVIL APPLICATION NO.6068 OF 1999 (FOR PRODUCTION OF DOCUMENTS)

46. Civil Application No.6068 of 1999 for production of documents and interim relief was filed by the appellant on June 29,1999. The application was ordered to be heard along with the appeal. On the title of the application, the appellant has not stated under which provision the application is filed for production of documents. At the time of arguments, learned Senior Counsel for the appellant submitted that the application was filed under O.11 Rule 14 of the Code. Rule 14 of Order 11 of the Code reads as under:

"Production of documents.

It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

Rule 14 of Order 11 will apply during pendency of any suit, wherein, the Court can order production of documents. Before the District Court, the respondent, in their affidavit, in clear words, had stated that the respondent had sold its business of textile components in Germany as well as in Singapore in March/April 1999. Even the respondent in their affidavit averred that they will produce the document of sale at the time of hearing of the application. Some how or other the said document of sale was not produced in the District Court at the time of hearing of the application. The appellant did not file any application for production of documents in the District Court and when the sale was already completed, the appellant, at the appellate stage, wants to invoke the provision of Rule 14 of Order 11 of the Code, which cannot be permitted. If the production of documents is permitted at the appellate stage, it would amount to permitting the appellant to produce additional evidence under Order 41 Rule 27 of the Code. Additional evidence under Order 41 Rule 27 can only be permitted if conditions under clause (1) of Rule 27 are satisfied. In my view, none of the conditions of clause (1) of Rule

27 is satisfied and, therefore, production of documents cannot be permitted at the appellate stage. The Apex Court, in the case of N.R.Dongre and others vs. Whirlpool Corporation and another, (1996) 5 Supreme Court Cases 714, in paragraph 11, has held as under:

"An attempt was made at the hearing before us by the appellants to place reliance on some additional material produced at this stage. It is sufficient to observe that this appeal has to be decided on the basis of material produced in the trial court. We may add that the trial court itself has referred to Order 39 Rule 4 CPC granting liberty to move an application thereunder, if there be any significant additional material available to invoke the jurisdiction of the trial court for the discharge or variation of the order of temporary injunction. We may add that the additional material produced at this stage is also not sufficient to swing the balance in the other direction."

The appellant, having lost opportunity of getting document of sale produced at the trial, cannot get it produced at the appellate stage in view of the settled legal principle as propounded by the Apex Court. The scope of the appeal before this Court is very limited and no additional evidence can be permitted to be produced, because the Court has to decide the case on the basis of materials stand before it. If at all the appellant wants to get the documents produced, they can get it produced before the Arbitrators, the proceedings before whom have already commenced as per the statement made by learned Senior Counsel appearing for both the sides. Therefore, in my opinion, this application for production of documents is not maintainable before this Court under Order 11 Rule 14 of the Code or under Order 41 Rule 27 of the Code. Hence, the application is dismissed.

CIVIL APPLICATION No.4841 of 1999 (for interim relief)

47. This application is filed by the appellant-applicant for interim relief as prayed for in paragraph 9 as under:

"(A) Your Lordships may be pleased to allow this Civil Application and be pleased to stay the operation and implementation of the order dated 12.5.1999 at Annexure "A" hereto;

(B) Pending the hearing and final disposal of the First Appeal against the order dated 12.5.1999 passed by the learned District, Baroda, Your Lordships may be

pleased to restrain the opponents by themselves, their servants, agents, etc. by way of an interim order, from in any manner selling, transferring or assigning, including to their group/parent/associate/licensee company/ies, the assets, both intangible and tangible, including intellectual property rights, know-how, drawings, toolings/machinery, etc. and rights attached thereto that are the subject matter of arbitration."

Learned District Judge, Vadodara, in Misc. Application No.70 of 1999, under Section 9 of the Act, on April 20, 1999, passed following order:

"Heard both the sides on application. Perused the papers. Looking to the facts of the case, the respondent is selling the property in question, then in the circumstances, the rival party defeating the rights and multiplicity of suit arise and there would be complications, hence, looking to the facts and circumstances of the case, in the interest of justice, parties are directed to maintain status-quo till the hearing of Interim Application filed in this case. Notice to other side."

Misc. Application No.70 of 1999 was dismissed by the District Court, Vadodara, on May 12, 1999. However, learned District Judge had extended order of status quo for 15 days so as to enable the appellant to approach the higher forum. The appellant-applicant presented First Appeal No.3109 of 1999 along with Civil Application No.4841 of 1999 on May 24, 1999 and learned single Judge of this Court had extended the order of status quo till June 22, 1999. During hearing and pendency of the appeal, the order of status-quo was extended from time to time and ultimately extended till pronouncement of this judgment. For the reasons stated in the judgment, as the appellant-applicant is not entitled to claim any interim measures under Section 9 of the Act, this Civil Application deserves to be rejected.

48. If the injunction or order of status-quo is granted in favour of the appellant, it would extend duration of the Collaboration Agreement, which comes to an end in the month of September 1999. It is quite uncertain when the arbitration proceedings will be completed. The Civil Court, in its order dated January 2, 1999, had directed the Arbitrators to declare award within four months, but, still the hearing before the Arbitrators is not yet commenced. Learned Senior Counsel appearing for both the parties have stated at the Bar that the next date of hearing before the Arbitrators is

fixed on August 8, 1999. Therefore, if injunction or order of status quo is granted in favour of the appellant, it would amount to extending the period of Collaboration Agreement, because, in case arbitration proceedings are not completed by the month of September 1999, injunction would continue to operate even after September 1999, which, in my opinion, cannot be done. For this reason also, the order of temporary injunction or status quo cannot be granted in favour of the appellant.

49. In the result, Civil Application No.4841 of 1999 is rejected. The order of status quo granted earlier is vacated.

50. After the pronouncement of the judgment, Mr. K.S. Nanavati, learned Senior Counsel for the appellant, has requested to extend the order of status quo granted on April 20, 1999 which is continued till today, to enable the appellant to approach the higher forum. Learned counsel for the respondent has vehemently opposed extension of order of status-quo. In the facts and circumstances of the case and in view of the fact that the order of status-quo was granted by the District Court, Vadodara, after hearing both the sides, which is continued till today, it would be in the fitness of things to extend the order of status quo for further period of fifteen days to enable the appellant to approach the higher forum. Accordingly, the order of status quo granted earlier is ordered to continue for further period of fifteen days.

(swamy)